

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO ex rel.
BOSTON HILLS PROPERTY
INVESTMENTS LLC, et al.

C. A. No. 24205

Appellees

v.

VILLAGE OF BOSTON HEIGHTS, OHIO

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2007-07-4696

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 15, 2008

SLABY, Judge.

{¶1} Appellant, Raymond Kuchar, appeals the trial court’s denial of his motion to intervene in a declaratory judgment action filed by Boston Hills Property Investment, LLC (“Developer”) against the Village of Boston Heights, Ohio (“Boston Heights”). We affirm.

{¶2} This action began when Developer filed a complaint for declaratory judgment challenging the constitutionality of various provisions of the Village’s Planning and Zoning Code as applied to property owned by Developer, which application prohibited commercial use of Developer’s property. On November 14, 2007, Developer filed a motion for summary judgment. Prior to the trial court ruling on the motion, Developer and Village resolved the matter and entered into an agreed judgment entry. The trial court approved and entered the agreed judgment entry on April 14, 2008. In the judgment entry the parties agreed, among other things, that Developer could develop 100 acres of property for business use. On April 15, 2008, Kuchar filed a motion to intervene in the action to appeal the approval of the judgment entry.

Kuchar's motion asserted that, "because he owns property adjacent to [Developer's] property, [he] will suffer significant damages if [Developer] succeeds in judicially rezoning its property from residential use to a big-box retail business use." Kuchar supported his motion with a memorandum. Both the Village and Developer responded to Kuchar's motion and Kuchar replied. On May 8, 2008, the trial court denied Kuchar's motion because "[n]o pleading accompanied the Motion as required by Civ.R. 24(C)." Kuchar timely appealed and raises two assignments of error.

Assignment of Error No. I

"The trial court erred in denying [Kuchar's] motion to intervene."

{¶3} In his first assignment of error, Kuchar argues that the trial court abused its discretion when it denied his motion to intervene under Civ.R. 24(A)(2). This Court disagrees.

{¶4} "An appellate court reviews a decision regarding a motion to intervene under an abuse of discretion standard." *In re M.S.*, 9th Dist. No. 22158, 2005-Ohio-10, at ¶30, citing *In re C.M.*, 9th Dist. No. 21720, 2004-Ohio-1984, at ¶18, citing *In re Goff*, 11th Dist. No. 2001-P-0144, 2003-Ohio-6768, at ¶11. See, also, *Kayatin v. Petro*, 9th Dist. No. 06CA008934, 2007-Ohio-334, at ¶9; *In re Schmidt* (1986), 25 Ohio St.3d 331, 336. But, see, *In re M.N.*, 9th Dist. No. 07CA0088, 2008-Ohio-3049, at ¶5 (holding that the denial of a motion to intervene as of right is reviewed de novo). The analysis and result in this case is the same under either standard of review.

"Rule 24(A) provides for intervention as of right for any timely applicant who meets the requirements of the rule. Under Rule 24(A)(2), an applicant 'shall be permitted to intervene in an action' if he 'claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'" *In re M.N.* at ¶12, quoting Civ.R. 24(A)(2).

{¶5} Civ. R. 24(C) states:

“A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.”

{¶6} The trial court denied Kuchar’s motion to intervene because “[n]o pleading accompanied the [m]otion as required by Civ.R. 24(C).” We agree with the trial court. As we stated in *In re M.N.*, “[r]egardless of whether an applicant argues for intervention as of right or permissive intervention, he must adhere to the requirements of part (C) of the rule.” *Id.* at ¶14. Kuchar did not include a qualifying pleading with his motion as is required by Civ.R. 24(C). The trial court, therefore, properly denied Kuchar’s motion to intervene. See, e.g., *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701, at ¶11 (denying motion to intervene in an original action in the Supreme Court of Ohio.)

Assignment of Error No. II

“The trial court erred in approving the agreed judgment entry in this action.”

{¶7} In his second assignment of error, Kuchar argues that the trial court improperly adopted the agreed judgment entry. Because we held in our discussion of Kuchar’s first assignment of error that the trial court properly denied Kuchar’s motion to intervene, Kuchar was not a party to the proceedings in the trial court. Accordingly, Kuchar has no right or standing to appeal any judgment of the trial court. *In re Estate of Markovich*, 9th Dist. No. 06CA008868, 2006-Ohio-6064, at ¶12. Kuchar’s second assignment of error is overruled.

{¶8} Each of Kuchar’s assignments of error is overruled and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNN C. SLABY
FOR THE COURT

DICKINSON, J.
CONCURS, SAYING:

{¶9} I concur with the majority's judgment and most of its opinion. I write separately to note my continuing belief that the applicable standard of review for intervention as of right is de novo. See *In re M.N.*, 9th Dist. No. 07CA0088, 2008-Ohio-3049, at ¶5.

CARR, P. J.
DISSENTS, SAYING:

{¶10} I respectfully dissent, as I believe that the majority’s decision unjustly emphasizes form over substance.

{¶11} I do not believe that this Court is compelled to affirm the trial court’s denial of the motion only because Kuchar failed to include a qualifying pleading with his motion to intervene as “required” by Civ.R. 24(C). I recognize that the Ohio Supreme Court has denied motions to intervene in original actions before it for the succinct reason that the prospective intervenor failed to comply with Civ.R. 24(C) by accompanying the motion to intervene with a pleading. See, e.g., *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, at ¶22; *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701, at ¶11; *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, at ¶13. In those cases, the matter was yet unresolved and on-going, precisely the time in which the filing of a pleading authorized by Civ.R. 7(A) would be relevant to the action.

{¶12} This case is distinguishable, however, because the underlying action had terminated in a final judgment when Kuchar moved to intervene. Therefore, there was no pleading under Civ.R. 7(A) that he could have filed to seek redress. The Supreme Court, however, appears to have recognized this dilemma. In *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, several residents/taxpayers sought a remedy after the trial court had journalized a developer’s and city’s agreed entry. The high court expressly recognized that the residents/taxpayers could have filed a motion to intervene in the case below and then either file a

motion for contempt or an appeal to the appellate court, neither of which filing constitutes a pleading under Civ.R. 7(A). *Obojski* at ¶17.

{¶13} This Court has also recognized the propriety of allowing intervention where the intervenor has not filed the motion accompanied by a pleading. In *State Farm Mut. Ins. Cos. v. Young*, 9th Dist. No. 22944, 2006-Ohio-3812, this Court affirmed the trial court's granting of a motion to intervene where the intervenor was granted leave to file a responsive pleading subsequent to, rather than contemporaneously with, the motion. I agree with this less restrictive application of Civ.R. 24, especially in cases where non-parties seek post-judgment intervention. For the reasons enunciated above, I would sustain Kuchar's first assignment of error, and reverse and remand the matter to the trial court for a substantive determination of Kuchar's motion to intervene.

APPEARANCES:

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STEPHEN W. FUNK, Attorney at Law, for Appellee.

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